It seems there was no evidence whatever to show that. All the plaintiff had to rely upon was the evidence as to his being dispossessed by Government in a certain sense of 1,200 beegahs, and of those lands being comprised within the boundaries of the mouzah in which these 1,200 beegahs were contained. Both the Courts below, therefore, placed the defendant in considerable difficulty, both as to pleading and as to proof, by calling upon him, in effect, to make out both title and possession in regard to these lands.

It seems to me that the Courts below were not entitled to place the defendant in this position. His case was a simple one. He set up the bar of limitation, and he asked the Courts to call upon the plaintiff to remove that bar. It seems the plaintiff failed to do so, and the suit ought, therefore, to have been dismissed.

I think, therefore, that the decision of both the Courts below must be set aside, and this appeal allowed with costs.

Ainslie, J.—I concur.

The 19th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Contract—Specific performance—Purchase-money.

Case No. 797 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 31st January 1870, reversing a decision of the Moonsiff of that District, dated the 16th April 1869.

Mahadoo Begum (Defendant), *Appellant,*

versus

Syud Hubeebool Hossein and others (Plaintiffs), *Respondents.*

Mr. C. Piffard for Appellant.

Mr. R. E. Twidale for Respondents.

Plaintiff had entered into a contract with one of the defendants for the purchase of certain immoveable property, and after he made a small advance, the contract was written out and registered. The purchaser refusing to pay up the purchase-money unless the vendor paid the costs, or half the costs, of registration, the latter re-sold the property to a third person. The present suit was to compel the completion of the contract and delivery of the property.

HELD that, as the parties had entered into a written contract, the Court was bound to see whether it was, or was not, their intention that a complete and binding sale should take place, although the purchase-money was not paid.

HELD that in bringing such a suit plaintiff was bound, if he had not previously tendered the money to the defendant, to pay it into Court.

Jackson, J.—THE plaintiff in this case had entered into a contract with one of the defendants, who was owner of certain immoveable property, for the sale of that property, the purchase-money being fixed at 174 rupees. The purchaser made an advance of 7 rupees, after which the contract was written out and registered. The vendor, it seems, did not part with the deed, but retained possession of it for some time, and then, the purchaser being absent, complained to the purchaser's brother that the contract was not carried out. That brother wrote to the purchaser, who, in reply, sent a letter to the effect that, if the vendor would pay the costs, or half the costs, incurred in registration, he would pay up the purchase-money. The vendor declined to pay any part of costs of registration, and after a delay of nearly a year re-sold the property to a third person. The plaintiff, who was the first purchaser, now sues to compel the completion of the contract and delivery of the property to him.

The Moonsiff who tried the suit considered that the plaintiff, by refusing to pay up the purchase-money which he had paid in part, had entitled the defendant to resile from the contract and to re-sell the property. The Subordinate Judge was of a different opinion: he came to the conclusion that the 7 rupees advanced was for part of the consideration-money, and that, according to the principles of the Mahomedan Law of Contract, a complete and binding sale had taken place, and therefore ordered that the sale should be carried out; but, singularly enough, he appears to have allowed the plaintiff three months' time from the date of the decree within which to pay the purchase-money.

Against this decision, the defendant, who is the second purchaser, appeals specially. The objections taken are shortly these: That, in the first place, the Lower Appellate Court erroneously applied the general principles of Mahomedan Law to a case in which the parties had respectively entered into a written contract containing certain stipula-

tions, one of which was that the payment of the full amount of purchase-money should be a condition precedent to the extinction of the vendor's title. The other ground is that the Lower Appellate Court has altogether misconceived and mis-stated the evidence as to payment of part of the consideration-money.

It appears to me that both these objections are to some extent well-founded. The parties had entered into a written contract; the Court was, therefore, bound to see whether it was, or was not, the intention of the parties that a complete and binding sale should take place, although the purchase-money was not paid. There are words in the contract which justify doubt on the subject, and that question is one which ought to be considered.

Secondly, I think there is no doubt that the evidence would point to quite a different conclusion from that to which the Subordinate Judge has come as to the payment of consideration-money. So far as we can see, that payment undoubtedly was a payment on account of the expenses of preparation and registration, and those expenses are usually borne by the purchaser. But independently of that, it seems to me that the Subordinate Judge was not justified in saying that the evidence of the witnesses set up that which he states they set up. It appears that only one of the witnesses spoke to some declaration on the part of the vendor, whereas another of the witnesses, possessing much better means of knowledge, spoke distinctly to the contrary effect. And besides that, there was the letter of the purchaser himself which appears to be almost conclusive upon the point, which clearly shows that he looked upon the payment which he had made as a payment made on account of registration. It would also seem that at that time he had no precise conception in his mind of what he was entitled to, because he insisted that the vendor should pay either the whole or half of that amount, whereas, if he had really paid any part of the purchase-money, he would have been clearly entitled to take credit for the whole of such payment.

It is quite clear, therefore, that the evidence was not properly considered and the effect of it mis-stated, and that, upon this point, at any rate, it should be re-considered. The case will, therefore, be remanded for a new trial, regard being had to the observations which I have made.

I must also observe that it was quite improper on the part of the Subordinate Judge to allow the plaintiff a period of three months after decree to pay the money of the decree. The plaintiff, it seems to me, was bound in bringing such a suit as the present, if he had not previously tendered it to the defendant, at all events to have paid the money into Court when he brought the suit.

Ainslie, J.—I concur.

The 19th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Possession—Title.

Case No. 1228 of 1870.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Cachar, dated the 30th March 1870, reversing a decision of the Moonsiff of that District, dated the 28th August 1869.

Golam Reza Chowdhry and another (Defendants), *Appellants,*

versus

Chandoo Meah Lushkur (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Tarucknath Sein for Respondent.

In a suit to recover possession of land which both plaintiff and defendant claimed to have reclaimed from jungle and to have possessed many years, and for which both claimed to have obtained pottahs from Government, the mere fact that, the land was included in plaintiff's pottah was held to be insufficient to entitle him to a decree.

Jackson, J.—It seems to me that the decision of the Officiating Deputy Commissioner of Cachar cannot stand.

The plaintiff in this case brought the suit to recover possession of a certain plot of land from the defendant. He alleged that the land in question had been 15 or 16 years ago in the possession of himself and a co-sharer; that subsequently in 1857 he had obtained a pottah of it from Government, the land having fallen to his share under a